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Supreme Court, U.S.
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App. No. 0

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

C. LYNN MOSES
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the lower court's holding that there is Clean Water Act jurisdiction over a flood control channel created over 100 years ago by an irrigation diversion, that carries water only when released by the irrigators who own the water, and which never carries water for more than two months out of the year conflicts with this Court's decision in Rapanos v. United States, 126 S.Ct. 2208 (2006), the Agencies' own regulations following Rapanos, and the decision of the Eleventh Circuit in United States v. Robison, 505 F.3d 1208, 2007 WL 3087419 (11th Cir. 2007).

Whether the lower court's holding that a violation of the Clean Water Act can occur when it is undisputed that maintenance of this flood channel occurred only when no water was present, there was only removal of gravel debris from the channel and no evidence of an introduction of any outside material into this flood channel and none of the gravel dislodged through maintenance ever made it into a navigable water of the United States conflicts with this Court's decision in Rapanos v. United States, 126 S.Ct. 2208 (2006) and the decision of the Eleventh Circuit in United States v. Robison, 505 F.3d 1208, 2007 WL 3087419 (11th Cir. 2007).

Whether the lower court's decision upholding the conviction of Mr. Moses conflicts with the D.C. Circuit's decision in National Association of Home Builders v. U.S. Army Corps of Engineers, 440 F.3d 459, 2006 WL 250234 (D.C. Cir. 2006), finding the

Tulloch II rule (See, 33 C.F.R. § 323.2(d)(2)(i) and 40 C.F.R. § 232.2(2)(i)) under which Mr. Moses was convicted to be outside the statutory authority of the Corps of Engineers.

PARTIES TO THE PROCEEDING

Petitioner C. Lynn Moses was Defendant/Appellant in this matter.

Respondent United States of America was the Plaintiff/Appellee in this matter.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner C. Lynn Moses respectfully petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit to affirm the Idaho District Court's conviction of Mr. Moses in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (Appendix, *infra*, pp. 1a-19a) is available at 496 F.3d 984 (9th Cir. 2007). The Idaho District Court Judgment in a Criminal Case dated June 20, 2006 (App., *infra*, pp. 21a-36a) is unreported.

STATEMENT OF JURISDICTION

This action concerns the jurisdictional reach of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The Idaho District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The Judgment in a Criminal Case was entered on June 20, 2006. (App., *infra*, pp. 21a-36a). Defendant's Notice of Appeal was filed on June 27, 2006. The Ninth Circuit Court of Appeals decision affirming Mr. Moses' conviction was entered August 3, 2007. (App., *infra*, pp. 1a-19a). On September 14, 2007, the Ninth Circuit Court of Appeals issued an Order Denying Petition for Rehearing and Rehearing

En Banc. (App., *infra*, p. 20a). Petitioner requested a 30-day extension to file this petition and, on November 30, 2007, was granted an extension until January 11, 2008.

STATUTORY PROVISION INVOLVED

This action concerns the jurisdictional reach of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

STATEMENT OF THE CASE

This criminal prosecution, brought pursuant to 18 U.S.C. §3231, *see*, App., *infra*, p. 37a, centered around maintenance of a flood channel created over 100 years ago by an irrigation diversion. This flood channel carries water only when it is released by the irrigators and carries water for less than two months out of the year as a flood control mechanism. In 1980, when Mr. Moses became involved, the flood channel opened into a flood fan. Mr. Moses re-routed the path into a single channel that could successfully carry the water into the county's storm culvert without flooding the nearby town of Driggs, Idaho and the development contemplated by Mr. Moses. Periodic maintenance was required to keep the water in a single channel by removing gravel deposited by prior floods. None of the maintenance work was done when there was water in the channel. No foreign materials were introduced. There are no wetlands in the area. None of the gravel disturbed during the maintenance operations ever migrated to any navigable water of the United States.[1] It was the

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[1] The Court of Appeals erroneously stated that the gravel migrated into Teton River, *see* App., *infra*, p. 16a. There was no evidence to support this conclusion. *See* App., *infra*, p. 51a-53a:

> Now, there are areas downstream that have problems. There is no question about that. But those problems are – in large part are this natural eluvial fan deposit working because as you start down through the area – and the area right where I'm drawing a mark which is kind of

periodic maintenance that Mr. Moses was engaged in during the 2002 - 2003 period for which he was indicted.

When Mr. Moses undertook control of the flood channel in 1980, inquiry was made of the Corps of Engineers by the county. The Corps took the

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a curve, the grading at that point is 95.8 feet per mile; in other words, in one mile the stream drops 95.8 feet in this little region there.

At the area below the bridge, it gets down below 40. By the time it gets to the Teton River it's six feet per mile. So 95 here, 6 down at the river. And the river down near the confluence between the Teton River and the Teton Creek is totally different. Now, there's no way of showing you the picture. But downstream below an area just off this map the stream is a nice meander. There's no gravel showing. It goes into the Teton River cleanly without any piles of gravel or anything there.

So what happens is that somewhere between Mr. Moses's property, which is right here, and downstream of the highway, which is just off this map, the gravels from anywhere have to stop. So the sand, the gravels, the materials that you saw in most of those photographs are course, heavy graded materials. They're not clay. You can see the rocks. They're big. And so that material has to drop somewhere in this vicinity below this point where it's 95 feet per mile down to an area down where it's about 20 feet per mile, which is below the highway that goes north, south into Driggs, and it's just off this map. You can see Driggs is here. It's just off the edge.

position that there was no Clean Water Act jurisdiction. Periodically, for the next 20 years, Mr. Moses would be contacted by the Corps of Engineers and he would remind them that they had no jurisdiction. That explanation seemed to satisfy them and they would go away. In 2002, agents of the Environmental Protection Agency began to assert jurisdiction over this flood channel that ultimately resulted in this prosecution.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

The EPA, The Corps of Engineers, and the Ninth Circuit Court of Appeals in this case have belligerently refused to follow this Court's recent admonition in Rapanos v. United States, 126 S. Ct. 2208 (U.S. 2006), that there are limits to the jurisdictional reach of the Clean Water Act.

Back in the early 1980's when Mr. Moses' maintenance of this flood channel began, the U.S. Army Corps of Engineers recognized that there were limits to the jurisdictional reach of the Clean Water Act. They were presented with the plans of Mr. Moses to re-route the flood channel and expressly declined jurisdiction. When the city of Driggs was flooded a few years later they reiterated their lack of jurisdiction and washed their hands of the problem.[2]

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[2] The Court of Appeals erroneously stated that by 1982 the Corps had clearly asserted jurisdiction. This was, at best, disputed at the trial. As late as 1996, Mr. Kagel, a former agent of the Corps of Engineers, testified that the Corps was taking a hands-off approach to Mr. Moses' activities. *See* App., *infra*, pp. 47a-48a.

Twenty years later, a new group of administrators at the Corps, in conjunction with the EPA, decided to assert Clean Water Act jurisdiction over anything wet throughout the nation and, as part of that expansive shift in jurisdictional analysis, brought this criminal prosecution against Mr. Moses for the same periodic maintenance that he had been performing for twenty years.

This Court in Rapanos reversed the expansive trend in Clean Water Act jurisdiction. The Court in a plurality decision, made it clear that the Clean Water Act does not apply to everything wet, but to

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Q: What did you do?
A: I contacted the office because I thought they should take some action. And I was trying to encourage them that some action should be taken; enforcement action, quite honestly.
Q: When you say you contacted the office, who did you contact?
A: The chief of regulatory, Mr. Brad Daly.
Q: And what kind of a report did you make to Mr. Daly?
A: I told him that there was work being done in the channel that triggered Section 404 and that my recommendation was that we take some type of action, like a cease and desist or a letter, an after-the-fact application or something.
Q: And did you receive a response from Mr. Daly?
A: Yes, I did.
Q: What was his response?
A: He said that he was going to take no action and for me to not do any further investigation, that Mr. Brochu would be handling that.

"only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes." Rapanos, 126 S. Ct. at 2212. The phrase does not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Id. This flood channel created by an irrigation diversion does not fit the Pluralities' definition.

Even if one only considers the concurring opinion of Justice Kennedy, it is still incumbent on the United States to show a significant nexus between the activities of a defendant and the goals of the Clean Water Act to maintain the physical, biological, and chemical integrity of waters of the United States. Unfortunately, the Rapanos decision came after the trial in this case and the Court of Appeals made no effort to explain how Mr. Moses' activities took place in a "water of the United States" or even how there is a significant nexus between Mr. Moses' maintenance activities and protection of the chemical, biological and physical integrity of a water of the United States when such maintenance is undertaken in a dry flood channel that runs only two months out of the year, has no impact on any wetland, never introduces foreign materials, and the gravel being removed never migrates into waters of the United States. This decision by the Court of Appeals on this important federal question flies in the face of, and conflicts with, this Court's recent decision in Rapanos v. United States, 126 S. Ct. 2208 (U.S. 2006), and conflicts with at least one decision of

another Court of Appeals. The Eleventh Circuit, in United States v. Robison, 505 F.3d 1208, 2007 WL 3087419 (11th Cir. 2007), held that a conviction could not be upheld where the significant nexus analysis had not been undertaken, even though the conviction occurred before Rapanos. A memorandum opinion by the trial court on remand points out the serious difficulty the lower courts are having in applying Rapanos and the need for further guidance by this Court. See United States v. Robison, --- F.Supp.2d----, 2007 WL 3355112 (N.D. Ala).

Moreover, Mr. Moses was convicted on the strength of the Tulloch II rule (See, 33 C.F.R. § 323.2(d)(2)(i), *see*, App., *infra*, p. 42a, and 40 C.F.R. § 232.2(2)(i), *see*, App., *infra*, p. 43a) and the Corps' attempts to enforce its regulations of fallback from dredging operations. In Mr. Moses' case, the government took the position that there was massive "fallback" and that it could not have been considered "incidental fallback," yet there was no attempt to quantify the amount of fallback from these operations designed to open the channel and remove gravel that had washed down in the latest flood. Indeed, there was not even an instruction on incidental fallback and thus the jury could not have made the important determination whether more than incidental fallback occurred. (App., *infra*, pp. 55a-56a) The United States District Court, District of Columbia, on remand from the D.C. Circuit, National Association of Home Builders v. U.S. Army Corps of Engineers, 440 F.3d 459, 2006 WL 250234 (D.C. Cir. 2006), recently struck down the Tulloch II regulation. National Ass'n of Home Builders v. U.S.

Army Corps of Eng'rs, 2007 WL 259944 (D.D.C., 2007). In Mr. Moses' case, none of the lower courts would even address this issue. Their decision, when juxtaposed against the decision in National Association of Home Builders v. U.S. Army Corps of Engineers, 440 F.3d 459, 2006 WL 250234 (D.C. Cir. 2006), and National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 2007 WL 259944 (D.D.C., 2007), create just the type of embarrassing division in the law which certiorari jurisdiction of this Court is designed to correct.

THE NINTH CIRCUIT DECISION IN THIS CASE IS IN CONFLICT WITH THE ELEVENTH CIRCUIT ANALYSIS OF CLEAN WATER ACT CASES FOLLOWING *RAPANOS*.

Some Appellate Courts that have addressed Rapanos, and even the EPA and the Corps of Engineers in their analysis of Rapanos and its application to facts similar to Mr. Moses cleaning out the gravel from a channel that carries water only intermittently, have concluded that Clean Water Act jurisdiction does not apply to such activities in such areas, at least unless they are shown to significantly impact the physical, biological, or chemical integrity of the Nations navigable waters. See, e.g., United States v. Robison, 505 F.3d 1208, 2007 WL 3087419 (11th Cir. 2007). In Robison, the defendants had regularly dumped chemical pollutants into a creek that flowed continuously past their plant in violation of their permit. That creek flowed into another

stream that had been dammed to create a lake from which flowed a stream that flowed into a navigable water. The Eleventh Circuit, after determining that Justice Kennedy's concurrence in Rapanos was controlling, reversed the conviction and remanded for a new trial because the Court had not instructed the jury on the need to examine whether there was a significant nexus between the defendants' activities and the physical, chemical, or biological integrity of a navigable water of the United States. The case was remanded to see whether the Government could meet that evidentiary standard in a new trial. In Moses' case, a judgment of acquittal is called for since it is undisputed that there is no nexus between Mr. Moses activities and the physical, chemical and biological integrity of any navigable waters of the United States.

Mr. Moses' activities were all in uplands; no wetlands were located in the area. (App., *infra*, p. 45a) No foreign matter was introduced into this storm channel. The undisputed testimony was that Mr. Moses' only activity was removal of gravel that was washed downstream during prior floods and none of that gravel ever made it into a navigable stream. (See, footnote 1). Thus, the Ninth Circuit decision in this case and the Eleventh Circuit decision in Robison are in direct conflict as to the correct law to apply in cases such as this.

Indeed, the Ninth Circuit decision in this case also disregards the Agencies' own approach post Rapanos to cases such as this. The Rapanos case spurred the EPA and the Corps of Engineers to issue new guidelines for determining jurisdiction over any

particular area and under those guidelines, the area Mr. Moses was maintaining would not be considered a navigable water of the United States.

UNDER THE AGENCIES' INTERPRETATION OF THE JURISDICTION OF THE CLEAN WATER ACT AFTER *RAPANOS*, JURISDICTION CANNOT BE ASSERTED OVER THIS AREA.

Jurisdiction under the Clean Water Act could not be asserted over the flood channel under Rapanos and the interpretation of Rapanos adopted by the agencies.

In a recent publication provided to the Ninth Circuit Court of Appeals and to Moses by the Government, Clean Water Act Jurisdiction following the U.S. Supreme Court's decision in Rapanos v. United States and Carabell v. United States dated June 5, 2007, (App., *infra*, p. 57a-81a) the EPA and the Corps of Engineers set out the criteria by which a determination to assert jurisdiction over an intermittent stream is to be judged. Under their own criteria, a significant nexus between Mr. Moses' activity and the physical, biological, or chemical integrity of a navigable water of the United States is not to be had.

First, the Agencies set out those features over which they will not assert jurisdiction. Mr. Moses' flood control channel fits directly into this description:

> The Agencies generally will not assert jurisdiction over the following features:

* * *

> Ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.
> (App., *infra,* p. 58a).

The Agencies defined "relatively permanent flow of water" as "waters that flow year round or that have a continuous flow at least seasonally (e.g., typically three months)." (App., *infra,* p. 66a) This fundamental criterion immediately removes Mr. Moses' activities in this flood control channel from consideration. Mr. Moses' activities were to clean out a ditch used to control the flood waters that would periodically flow through the area in a plane. The Government stipulated at the trial court level that there are no wetlands in this area. (App., *infra,* p. 45a). Therefore, what the evidence showed at trial is a ditch that drains only uplands. The evidence at trial was that this channel was used for flood control purposes for only two months, in the years when there was any flow at all. (App., *infra,* pp. 49a-50a). This upland ditch that does not carry a continuous flow for at least three months is viewed by the agencies as being outside their jurisdiction. (App., *infra,* p. 58a).

If that were not enough, even if the agency were to consider this channel on a case-by-case basis, its own criteria would weed out this prosecution.

In order to assert jurisdiction, the agency must determine that a particular activity or feature has a significant nexus to the purpose of the Clean Water

Act, which is to preserve the physical, chemical, and biological integrity of the Nations navigable waters. 33 U.S.C § 1251, (App., *infra*, p. 38a). . This determination is, of course, required by the Kennedy concurrence in Rapanos.

It is undisputed that the area where Mr. Moses built this flood control channel is not a navigable water of the United States. Thus, Mr. Moses' simple maintenance of the channel had no impact on the physical integrity of a navigable water of the United States.

Likewise, there is no suggestion that Mr. Moses introduced any chemical or biological agent whatsoever into the area. Even the minimal trees that were used to repair existing log jams were trees washed down with the latest flood. Thus, there can be no argument that his actions affected the chemical or biological integrity of a navigable water of the United States.

This conclusion becomes more painfully obvious when the Court considers that the undisputed evidence at trial was that even the gravel that Mr. Moses is accused of disturbing through his annual maintenance of the flood channel never made it to the Teton River – the navigable river into which the flood waters of the channel may sometimes reach.[3] Additionally, there is no aquatic environment in this area, (App., *infra*, p. 44a), and there are no wetlands through the area of this flood control channel. (App., *infra*, p. 45a).

The conflict between the Ninth Circuit decision in this case and other appellate court

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[3] See, *supra*, footnote 1.

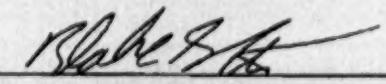
decisions as well as the wholesale failure of the Ninth Circuit to address the issues pursuant to the Agencies' own criteria, create the type of embarrassing situation that calls for a Writ of Certiorari and which has a substantial chance of resulting in a significant modification of the outcome in this case.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 13th day of March, 2008.

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APPENDIX

496 F.3d 984

United States Court of Appeals
For The Ninth Circuit

UNITED STATES of America, Plaintiff-Appellee,
v.
C. Lynn MOSES, Defendant-Appellant.

No. 06-30379
D.C. No. CR-05-00061-BLW
Opinion

Appeal from the United States District Court for the District of Idaho; B. Lynn Winmill, District Judge, Presiding.

Argued and Submitted
July 10, 2007 – Seattle, Washington

Filed August 3, 2007

Before: FERDINAND F. FERNANDEZ and KIM McLANE WARDLAW, Circuit Judges, and LOUIS H. POLLAK,* District Judge.

FERNANDEZ, Circuit Judge:

Despite numerous warnings over the years, Charles Lynn Moses continued to do work in the channel of Teton Creek in Idaho for the purpose of rerouting, reshaping and otherwise controlling the flow of the

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* The Honorable Louis H. Pollak, Senior United States District Judge for the District of Pennsylvania, sitting by designation.

waters of the Creek. The government finally prosecuted him for violating the Clean Water Act (CWA). *See* 33 U.S.C. §§ 1251-1387. He was convicted and sentenced, and now appeals. He claims that there was no discharge of pollutants into the waters of the United States. We disagree and affirm.

BACKGROUND

Moses is a real estate broker and developer in Driggs, Idaho. Beginning in the late 1970s, he worked on a development known as the Aspens Subdivision, an approximately 50 acre parcel of land in Teton County, Idaho, which is located on a flood plain next to Teton Creek. Because of an irrigation diversion structure installed in Alta, Wyoming, upstream of the subdivision, water actually flows in the portion of Teton Creek adjacent to the subdivision only during the spring run-off, which lasts about two months per year. During that time, water is released from the diversion. When it does flow, the volume and power of the flow are high, even torrential. Teton Creek is a tributary of the Teton River, which flows into the Snake River. Water continues to flow year-round in Teton Creek above the diversion, and also from a point below the subdivision until it reaches the Teton River. There is no claim that the Snake River, the Teton River, and Teton Creek, apart from the segment that flows only during the spring runoff, fail to qualify as waters of the United States.

Beginning in the 1980s, and continuing for more than 20 years, Moses has worked to reroute and reshape Teton Creek, in an attempt to convert the

original three channels of the Creek into one broader and deeper channel, which would carry all of the seasonal flow of water. Over that period, including during more recent work in 2002, 2003 and 2004, Moses hired heavy equipment operators to recontour and redeposit material within the Creek using bulldozers, and to erect log and gravel structures in the Creek using other heavy equipment.

Beginning in 1982 and on several occasions thereafter, the Army Corps of Engineers (the Corps) warned Moses that his stream alteration work required a CWA permit. During a hearing on the Aspens Subdivision in 1982, the Corps informed Moses that it did have jurisdiction over the stream, even though the flow of the stream was intermittent. In 1995, the Corps issued a cease and desist order that directed Moses to immediately stop all dredge and fill operations in Teton Creek. In 1996 and 1997, the Corps once again wrote to Moses, seeking his cooperation and explaining its regulations. Moses essentially ignored all of that.

On two separate occasions in 2002,[1] Moses hired the owner of Tupco, Inc., an excavation business to rebuild and repair log structures, to perform dredging and filling work, to build a temporary ramp, and to remove gravel bars in Teton Creek. An environmental resources specialist with the Corps saw the work going on within the Creek bed in September 2002, informed Moses that he needed a permit to conduct the work, and advised him that the

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[1] The work was performed once before the 2002 runoff and once after the runoff.

activities could result in civil or criminal penalties. Moses treated that warning with his usual disdain. In December 2002, the Corps issued a notice of violation to Moses, which again informed him of the need for a permit and of the potential for criminal penalties.

Undeterred, in Spring 2003,[2] Moses contacted the excavation business operator for a third time and asked him to work in Teton Creek. The operator again "repaired" log structures within the Creek bed, and moved gravel out of and within the Creek bed. Several months later, the Environmental Protection Agency (EPA) issued an administrative compliance order pursuant to 33 U.S.C. § 1319(a), which directed Moses to immediately "cease any unauthorized discharges of dredged material, fill material, and other pollutants to any stream bed and banks on the [s]ite," and to submit a work plan for restoring Teton Creek. Moses did not respond to the EPA's order, and less than two months later he hired the owner of Nord Excavating and Paving, Inc., to do more bulldozing work in Teton Creek. That consisted of the removal of gravel bars and contouring of the Creek bed.

Overall, the work on the Creek bed was substantial. Thousands of cubic yards of gravel and other materials were moved, and the channel was deepened, widened, and greatly disturbed. The disturbance reached both upstream and downstream of the work perpetrated by Moses and his minions. Of the hundreds of projects surveyed by Dale Miller, a

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[2] This work was hired before the 2003 high runoff.

government expert, Teton Creek was "probably one of the more impacted streams" he had observed, "both in terms of change [at the part in question here] and also the upstream and downstream effects that have resulted from that change." The Creek was unstable into the bargain.

Finally, in March 2005, a federal grand jury returned a three-count indictment charging Moses with felonious violations of the CWA for knowingly discharging, and causing to be discharged, pollutants (including dredged and fill material) from a point source or point sources into waters of the United States without a permit. *See* 33 U.S.C. §§ 1311(a), 1319(c)(2)(A); 18 U.S.C. § 2. The counts covered discharges by Moses into Teton Creek in the Aspens Subdivision area from 2002 to 2004.

A four-day jury trial was held in September of 2005. On September 14, 2005, after the close of the government's case, Moses timely moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which the court denied. Ultimately, the jury returned a verdict finding Moses guilty on all counts. In February of 2006, Moses moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure and attempted to introduce new evidence to support an estoppel argument. Moses claimed he had been misled by the government into believing that his conduct was lawful. The district court denied the motion. One month later, Moses filed a second motion for a new trial. The district court denied that motion also.

On June 30, 2006, the district court sentenced Moses to 18 months imprisonment on each count, to be served concurrently, and imposed a $9,000 fine, a $300 special assessment, and one year of supervised release. This appeal followed. Moses asserts that the evidence was not sufficient to support the verdict, and that he should have been granted a new trial.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

Because Moses "preserved his sufficiency claim by moving for a judgment of acquittal, we review his claim de novo." *United States v. Lyons,* 454 F.3d 968, 971 (9th Cir.2006). Evidence is sufficient to support a conviction, if " 'viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

We review for abuse of discretion a district court's denial of a motion for a new trial. *See United States v. Mack,* 362 F.3d 597, 600 (9th Cir.2004); *United States v. Sarno,* 73 F.3d 1470, 1507 (9th Cir.1995). A new trial may be granted by the district court when the "interest of justice so requires." Fed.R.Crim.P. 33(a); *Mack,* 362 F.3d at 600.

DISCUSSION

Moses primarily attacks his conviction on the ground that the evidence does not support a determination that the portion of Teton Creek that he manipulated constitutes a water of the United States,[3] and even if it does, the evidence will not support a determination that he made a discharge[4] into that United States water. We will take those issues up first. We will then address his secondary issues, which rely on a notion that he did not need a permit anyway. As already indicated, and as we will explain further, we do not agree with any of his theories.

A. *Sufficiency of the Evidence*

Moses' sufficiency arguments turn on his claims about the reach of the CWA. That law was enacted by Congress in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In order to achieve its objectives, Congress outlawed the unauthorized "discharge of any pollutant by any person." *Id.* § 1311(a). That, in turn, means that Moses could not add "any pollutant to navigable waters,"[5] which means "the waters of the United States."[6] As used in the CWA, pollutant means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sledge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural

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[3] 33 U.S.C. § 1362(7).
[4] 33 U.S.C. § 1362(16).
[5] 33 U.S.C. § 1362(12); *see also id.* § 1362(16).
[6] 33 U.S.C. § 1362(7).

waste discharged into water." *Id.* § 1362(6). Those facially simple provisions have generated a good deal of regulatory and judicial attention. Suffice it to say that while they are designed to bring clarity to the Nation's waters, they, themselves, are not hyaline. Moses was not much interested in the subtleties involved; he should have been before he undertook to ignore the government's steady trickle of warnings.

(1) *Waters of the United States*

The first thing that is apparent is that under both Corps and EPA regulations,[7] a body of water need not, itself, be navigable in order to be one of the waters of the United States. Even wetlands can come within that concept. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-35, 106 S.Ct. 455, 461-63, 88 L.Ed.2d 419 (1985). The Corps has issued regulations which define waters of the United States to mean:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) ...

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[7] We owe deference to the agencies' interpretations. *See San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 705 (9th Cir.2007).

....

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section....

33 C.F.R. § 328.3(a). EPA regulations are to the same effect. *See* 40 C.F.R. § 122.2 (definition of waters of the United States).

We do not see how one can gainsay the fact that Teton Creek was at least a tributary in the sense used by the Corps' definition before the Creek was interrupted at Alta, Wyoming. As we have noted, it flowed interstate and emptied into the Teton River, which itself emptied into the Snake River.[8] That being so, it is doubtful that a mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern. Rather, what the courts have said regarding navigable waters would seem applicable here. In *George v. Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir.1968), the court was faced with a claim that a boat floating on a man-made lake, which was created by damming the upper reaches of the White River, was upon navigable waters of the United States. The court, with no hesitation, declared: "If the river was navigable prior to construction of the dam, it continues to be considered as a navigable stream." *Id.*

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[8] There can be little doubt that a tributary of waters of the United States is itself a water of the United States. *See United States v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir.2006); *United States v. Phillips*, 367 F.3d 846, 855-56 (9th Cir.2004).

And in a case where it pointed out that navigability is not to be appraised on the basis of natural conditions only,[9] the Supreme Court went on to state that "[w]hen once found to be navigable, a waterway remains so." [10]

Similarly, we do not see how a mere man-made diversion, however long ago undertaken, could change Teton Creek from a water of the United States into something else. If the diversion could not do that, even the now often-dry portion of Teton Creek remains a water of the United States just as it was antediluvially. Of course, we recognize that the diversion did take place long before the enactment of the CWA itself. That should not change the analysis. But, as we will explain, regardless of that purely historical consideration, present conditions also dictate that the often-dry portion of Teton Creek is a water of the United States.

Put most starkly, the question is whether a seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States. In *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir.2001), we answered that question in the affirmative, when we held:

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[9] *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407, 61 S.Ct. 291, 299, 85 L.Ed. 243 (1940); *see also Boone v. United States*, 944 F.2d 1489, 1492-93 & 1493 n. 6 (9th Cir.1991).

[10] *Appalachian Elec.*, 311 U.S. at 408, 61 S.Ct. at 299.

But even if [the alleged polluter] succeeds, at certain times, in preventing the canals from exchanging any water with the local streams and lakes, that does not prevent the canals from being "waters of the United States" for which a permit is necessary. Even tributaries that flow intermittently are "waters of the United States."

Id. at 534. In so doing, we relied upon the following reflection by the Eleventh Circuit Court of Appeals:

[T]here is no reason to suspect that Congress intended to exclude from "waters of the United States" tributaries that flow only intermittently. Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... Rather, as long as the tributary would flow into the navigable body of water "during significant rainfall," it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir.1997) (citations and footnote reference omitted).

Since then, the Supreme Court has revisited this area, but has not undercut our prior analysis. *See Rapanos v. United States,* ··· U.S. ····, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). In that case, the Court actually directly dealt with the reach of the CWA over wetlands,[11] but in so doing addressed itself to

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[11] The scope of the wetlands regulation had been visited by the Court on two previous occasions. *See Solid Waste Agency v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 171-72, 121 S.Ct. 675,

the question of what could be a tributary. *Id.*, 126 S.Ct. at 2225. A four justice plurality ultimately declared:

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] ... oceans, rivers, [and] lakes." The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute."

Id. 126 S.Ct. at 2225 (citations omitted). But that absolute sounding statement must be taken in the context of the plurality's prefatory definitional statement that "[b]y describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months...." *Id.* 126 S.Ct. at 2221 n. 5. The four dissenting justices did agree that, "common sense and common usage demonstrate that intermittent streams, like perennial streams, are

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682-83, 148 L.Ed.2d 576 (2001); *Riverside Bayview Homes*, 474 U.S. at 139, 106 S.Ct. at 465.

still streams." *Id.* 126 S.Ct. at 2260 (Stevens, J., dissenting).

That left Justice Kennedy in the middle so to speak, or to put it more legally accurately, that left his opinion as the controlling rule of law. *See N. Cal. River Watch v. City of Healdsburg,* 457 F.3d 1023, 1029 (9th Cir.2006).[12] His opinion surely does not denigrate or even undercut the concept that a seasonal stream could be a water of the United States. In fact, he put it thusly: "[T]he dissent is correct to observe that an intermittent flow can constitute a stream, in the sense of a current or course of water or other fluid, flowing on the earth, while it is flowing. It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." *Rapanos,* 126 S.Ct. at 2243 (Kennedy, J., concurring) (internal quotation marks and citations omitted). In fact, he considered the plurality's general principle to be inadequate. As he said, in language quite apposite to the case at hand:

The plurality's first requirement — permanent standing water or continuous flow, at least for a period of "some months," — makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a "water" subject to federal regulation, while torrents thundering at irregular intervals through

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[12] Both in his brief and at argument, Moses has attempted to induce us to review and eschew *River Watch.* As Moses should know, we cannot do that. *See, e.g., Cal. Dept. of Water Res. v. FERC,* 361 F.3d 517, 521 (9th Cir.2004); *Murray v. Cable Nat'l Broad. Co.,* 86 F.3d 858, 860 (9th Cir.1996).

otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on "waters," that may not always be true. Areas in the western parts of the Nation provide some examples.

Id. 126 S.Ct. at 2242 (citation omitted). Justice Kennedy went on to hold that what is required is a showing of a "significant nexus" between wetlands and navigable waters, and declared that absent more specific regulations, the nexus must be established by the Corps "on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries." *Id.* 126 S.Ct. at 2249.

Therefore, far from undercutting our decision in *Headwaters,* the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States. That being so, we cannot say that the evidence here failed to sustain the verdict.

The man-made severance of Teton Creek at Alta, Wyoming, may have made the portion in question here dry during much of the year, but when the time of runoff comes, the Creek rises again and becomes a rampaging torrent that ultimately joins its severed lower limb and then rushes to the Teton River, the Snake River, and onward to the Columbia River and the Pacific Ocean. Indeed, it is that very rush of water that induced Moses to take action.

In short, on this record Teton Creek constitutes a water of the United States and, as the Supreme

Court has recognized, regardless of any other disagreements, "no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels." *Id.* 126 S.Ct. at 2221 n. 6. That glissades to consideration of Moses' next claim.

(2) *Discharge*

Moses' attack on the evidence to support the element of discharge of a pollutant fares no better. He argues that he did not run his heavy equipment and engage in his assault on Teton Creek while the water was actually rushing between its banks. Thus, he says, there was no discharge into waters of the United States. He is wrong.

Common sense tells us that, especially if the Corps retains jurisdiction, as it does,[13] the mere fact that pollutants are deposited while this part of Teton Creek is dry cannot make a significant difference. *See Headwaters,* 243 F.3d at 533-34; *Eidson,* 108 F.3d at 1342. To hold otherwise would countenance significant pollution of the waters of the United States as long as the polluter dumped the materials at a place where no water was actually touching them at the time.

In addition, the evidence clearly supports a determination that the result of Moses' efforts was to create a situation where pollutants — disturbed and moved materials as well as log structures — remained in Teton Creek when the water rose within

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[13] *See Rapanos,* 126 S.Ct. at 2221, n. 6.

it. In fact, those pollutants were intended to do just that. Even if no new materials were added to the Creek bed by Moses' activities, simply dredging up and redepositing what was already there is sufficient to run afoul of the CWA. *See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 261 F.3d 810, 814 (9th Cir.2001), *aff'd,* 537 U.S. 99, 123 S.Ct. 599, 154 L.Ed.2d 508 (2002) (affirmance by an equally divided Court); *Rybachek v. U.S. Envtl. Prot. Agency,* 904 F.2d 1276, 1285 (9th Cir.1990). Moreover, the evidence supported a determination that when the water flowed, materials dislodged by Moses' operations would be carried downstream into the lower portion of Teton Creek and on into the Teton River.

But, argues Moses, even if he did see to the moving of thousands upon thousands of cubic yards of material, by taking it from one part of Teton Creek and depositing it in another location within the Creek, that was no violation; it was just an incidental fallback of the material. *See* 33 C.F.R. § 323.2(d)(2)(i). Was it incidental fallback? To lay the definition alongside the evidence in this case is to answer the question. The regulations provide:

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

33 C.F.R. § 323.2(d)(2)(ii); *see also Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1403-04 (D.C.Cir.1998) (holding Corps can regulate redeposit, but must allow for mere incidental fallback). The evidence here shows massive movement and redistribution of materials within Teton Creek. Only a mind committed to a predetermined answer could see that material redeposit as similar to a small volume of dirt that happened to fall off a bucket and back to the approximate place of removal.[14]

The claim that there was insufficient evidence of discharge of pollutants must fail.

B. *Claims That No Permit Was Required*

After the jury verdict went against him, Moses tried to recoup by claiming that he did not need a permit in the first place, and was entitled to entirely ignore the demands of the EPA and the Corps. He should have listened.

Moses first points to the exception for discharges for the purpose of maintenance of currently serviceable structures. 33 U.S.C. § 1344(f)(1)(B). But that exception has an exception of its own because the work performed cannot further impair the waters of

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[14] We have not overlooked Moses' passing comment that there should have been an instruction on incidental fallback. However, because that was not raised at the district court, our review is for plain error, and on this record he has not shown any interference with any substantial rights. *See United States v. Tirouda*, 394 F.3d 683, 688 (9th Cir.2005).

the United States if the exception is to apply at all. *See id.* § 1344(f)(2); *see also* 33 C.F.R. § 323.4(a)(2). Exceptions from the CWA must be "analyzed in light of the Act's purposes" and exceptions must be construed narrowly. *United States v. Akers,* 785 F.2d 814, 819 (9th Cir.1986). As the district court pointed out, Moses' activities went far beyond anything that could be called mere maintenance of serviceable structures. He made great changes to Teton Creek itself, which can hardly be called a structure anyway. And even if some of the log placements within the Creek were, themselves, structures that could be repaired, some of those structures were actually built during 2001, and none of them were built pursuant to a permit. All in all, while Moses' theory might be interesting, the evidence is against him. The district court did not abuse its discretion when it denied a new trial on this basis.

Nor does Nationwide Permit No. 3, 67 Fed.Reg. 2078 (Jan. 15, 2002) (the Permit), supply the apotropaion that Moses seeks. In the first place, the Permit was issued pursuant to the Rivers and Harbors Act. *See* 33 U.S.C. § 403; *see also United States v. Cumberland Farms of Conn., Inc.,* 826 F.2d 1151, 1157-59 (1st Cir.1987). It does not apply to activities covered by the CWA. That was plain in 1980 when Moses first began his activities in Teton Creek, and it was plain during the period covered by the indictment. *See id.* at 1159-60.

Secondly, even if the Permit did have application here, it cannot be said that the vast amount of work on Teton Creek took place before the Corps asserted jurisdiction. At best, the new evidence submitted

vith Moses' motion for a new trial would indicate there is some conflict regarding his 1980 activity, but there can be no doubt that jurisdiction was asserted at least as early as 1982. It was surely asserted during the period covered by the indictment.

The district court did not abuse its discretion when it determined that a new trial based upon the Permit was not appropriate.

CONCLUSION

Moses chose to ignore all demands by the EPA and the Corps that he comply with the Clean Water Act before he undertook his activities in Teton Creek. Even if he was convinced that the Corps had eschewed jurisdiction in 1980, it is not clear why he thought that gave him a sempiternal right to continue after jurisdiction was duly asserted. And while his sang-froid (or even contempt) in the face of agency demands may show either courage or foolhardiness, it does not save him from the consequences of his actions.

The evidence supported the determination that Teton Creek does constitute a water of the United States and that Moses did discharge pollutants into it. Moreover, his actions were not exempt and were not taken pursuant to Nationwide Permit No. 3.

AFFIRMED.

Not For Publication
United States Court of Appeals
For The Ninth Circuit

FILED
Sep 17 2007
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES of America, Plaintiff-Appellee,
v.
C. Lynn MOSES, Defendant-Appellant.

No. 06-30379
D.C. No. CR-05-00061-BLW

ORDER DENYING PETITION FOR REHEARING AND REHEARING EN BANC

Before: FERNANDEZ and WARDLAW, Circuit Judges, and POLLAK,[1] District Judge

The Panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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[1] The Honorable Louis H. Pollak, Senior United States District Judge for the District of Pennsylvania, sitting by designation

United States District Court
District of Idaho

United States of America
v.
Charles Lynn Moses

JUDGEMENT IN A CRIMINAL CASE

Case Numbers: 4:05CR00061-001

USM Number: 12305-023

Blake Atkin
Defendant's Attorney

THE DEFENDANT:

__ Pleaded guilty to counts(s) _____

__ Pleaded nolo contendere to count(s) _____
which was accepted by the court.

X Was found guilty on count(s) one through three of the indictment
After a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended
33 § 1319(c)(2)(A)	Violation of Clean Water Act	04/30/2004

Count
1,2, and 3

The Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The Defendant has been found not guilty on count(s) _____

__ Count(s)_____ __ is __ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court of the United States attorney of material changes in economic circumstances.

06/19/2006
Date of Imposition of Judgment

s/ B. Lynn Winmill
Signature of Judge

B. Lynn Winmill, United States District Judge
Name and Title of Judge

s/ 6/20/2006
Date

DEFENDANT: Charles Lynn Moses
CASENUMBER: 4:05CR00061-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months on each of counts 1, 2, and 3, to be served concurrently. **COURT ORDERED STAY OF EXECUTION OF THIS JUDGMENT UNTIL A DECISION HAS BEEN MADE ON THE APPEAL.**

Defendant shall submit to DNA collection while incarcerated by the Bureau of Prisons or, absent collection while imprisoned, then at the direction of the U.S. Probation Office upon release.

X The court makes the following recommendations to the Bureau of Prisons:
That the defendant be credited with all time served, and that the defendant be placed in the facility at Sheridan, Oregon.

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district:

__ at _____ __ a.m. __ p.m. on _____.

__ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

__ before 2 p.m. on _____.

X as notified by the United States Marshal, **and that is consistent with page 3 of this judgment, and the court's separate order entered in this case.**

__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____

United States Marshal

By

_____

Deputy United States Marshall

DEFENDANT: Charles Lynn Moses
CASENUMBER: 4:05CR00061-001

ADDITIONAL IMPRISONMENT TERMS

If no appeal is filed within ten (10) days, the U.S. Marshal will immediately obtain a report date and so notify the defendant. If an appeal is filed, and the defendant's conviction and sentence is upheld, the U.S. Marshal will, following the conclusion of all appeal proceedings, obtain a report date and so notify the defendant.

DEFENDANT: Charles Lynn Moses
CASENUMBER: 4:05CR00061-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 1 year on each 1,2, and 3, to be served concurrently.

Court finds that the defendant does not pose a high risk of future substance abuse such as mandatory drug testing is waived.

The defendant must report to the probation office in the district to which the defendant is released or allowed to re-enter within 72 hours of release from the custody of the Bureau of Prisons, or re-entry to the United States.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment on supervised release and to periodic drug tests thereafter, not to exceed a maximum number of 3 per month.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not posses a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

— The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

— The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payment sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or else where and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Charles Lynn Moses
CASENUMBER: 4:05CR00061-001

SPECIAL CONDITIONS OF SUPERVISION

1) Defendant shall pay special assessment and fine that is imposed by this judgment and that remains unpaid at the commencement of supervised release as condition of supervision. Payments to be made to Clerk of the Court, District of Idaho, 550 W. Fort St., MSC 039, Boise, ID 83724. Defendant shall submit nominal monthly payments of 10% of gross income, but not less than $25 per month, during the term of supervised release, towards any fine and special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release. This payment schedule will be in effect unless further reviewed by the Court. A review may take place at any time and will be based upon a change in the Defendant's financial circumstances.

2) Defendant shall provide the probation officer with access to any requested financial information. Defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

3) Defendant shall submit to a search of his person, place of residence, or automobile at the direction of the U.S. Probation Officer and submit to seizure of any contraband found therein.

4) Defendant shall within 90 days of the commencement of his term of supervised release, defendant shall publish a notice in the Post-Register, Idaho Falls, Idaho State Journal, Pocatello, and Teton Valley News, Driggs, describing his unauthorized channelization of Teton Creed, that he was convicted on three counts of violating the Clean Water Act, and that he apologizes to the community for his conduct. The notice shall be approved by the Probation Officer before it is published. In the event that the proposed newspapers decline the defendant's editorials, the defendant must pay all costs associated with publication in another section of the newspapers. Cost of the notice shall be paid by the defendant. Defendant must provide the U.S. Probation officer with confirmation of publication.

5) Defendant shall comply with terms of the EPA Compliance Order Docket No. CWA-10-2004-0034, no later than 30 days following commencement of the term of supervised release. Defendant shall take the actions required by the order, including the schedule set forth in paragraph 2.2. Defendant preserves his appellate rights under the order.

Special conditions of supervised release shall supersede any standard condition that is inconsistent with the special conditions.

DEFENDANT: Charles Lynn Moses
CASENUMBER: 4:05CR00061-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$300	$9,000.00	$

__ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

__ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664 (I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

TOTALS $_____
$_____

__ Restitution amount ordered pursuant to plea agreement $_____

__ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment opitions on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the

X fine __ restitution.

__ the interest requirement for the

__ fine __ restitution is modified as follows:

DEFENDANT: Charles Lynn Moses
CASENUMBER: 4:05CR00061-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A __ Lump sum payment of $_____ due immediately, balance due
__ not later than _____, or
__ in accordance __ C, __ D, __ E, or __ F below: or

B __ Payment to begin immediately (may be combined with __ C, __ D, of __ F below); or

C __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ ____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D __ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ ____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E __ Payment during the term of supervised release will commence within _____ ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

$300 special assessment, consisting of $100 on each of counts 1, 2, and 3, is due immediately. $9000 fine, consisting of $3,000 on each of counts 1, 2, and 3, is due immediately. Payment to be made to Clerk of the court, District of Idaho, 550 W. Fort St., MSC 039, Boise, ID 83724. Defendant shall submit nominal payments of not less than $25 per quarter while incarcerated through the Inmate Financial Responsibility Program.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payment made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court cost(s):

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) cots, including cost of prosecution and court costs.

18 U.S.C. § 3231:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

33 U.S.C. § 1251:

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology

necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 C.F.R. § 323.2(d)(2)(i):

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

40 C.F.R. § 232.2(2)(i):

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

E.R. 117

this stream, correct, because of its intermittent nature?

A: You mean in the reach that we're speaking of?

Q: Yes.

A: Yes, that's correct.

Q: There is really no aquatic wildlife issue with regard to this stream; is there?

A: That's correct.

MR. ATKIN: That's all I have.

THE COURT: Anything else, Mr. Oesterle?

MR. OESTERLE: No, our Honor.

THE COURT: You may step down, Mr. Miller. Thank you.

I assume the witness can be excused?

MR. ATKIN: Yes, Your Honor.

MR. OESTERLE: Yes, Your Honor.

THE COURT: Call your next witness. Mr. Peak, I assume?

MR. OESTERLE: Yes, Your Honor.

THE COURT: Mr. Peak, will you step before the clerk and be sworn.

CHARLES PEAK,

called on behalf of the Government, having been first duly sworn upon oath, was examined and testified as follows:

E.R. 132

Sentencing memorandum, has gone way beyond 2002, 2003, and 2004. And in the presentence report, the probation officer talks about how the Court could enhance and maybe should enhance the penalty in this case based on the fact that there is a 25-year history in this case. Now, if the Court is · ·

THE COURT: No. I understand your position. Again, just so we're clear, Mr. Breitsameter, the Government is willing to stipulate that there was no discharge into any wetlands arising out of this case; correct?

MR. BREITSAMETER: That's correct, Your Honor.

THE COURT: But you cannot bind the Government by way of a stipulation that the Government perceives discharges into wetlands as being more serious than discharges into other riparian non-wetland areas?

MR. BREITSAMETER: To my knowledge, we have not explored that issue and I am not prepared to

stipulate to that.
THE COURT: All right. I will allow the witness to testify factually as to his understanding of the Corps of Engineers' views during the time period that he was employed there, and limit it in that fashion.

E.R. 134

not taking any action.
Q: Okay. Did you do anything further?
A: Oh, yes.
Q: What did you do?
A: I contacted the office because I thought they should take some action. And I was trying to encourage them that some action should be taken; enforcement action, quite honestly.
Q: When you say you contacted the office, who did you contact?
A: The chief of regulatory, Mr. Brad Daly.
Q: And what kind of a report did you make to Mr. Daly?
A: I told him that there was work being done in the channel that triggered Section 404 and that my recommendation was that my recommendation was that we take some type of action, like a cease and desist or a letter, an after-the-fact application or something.
Q: And did you receive a response from Mr. Daly?
A: Yes, I did.
Q: What was his response?
A: He said that he was going to take no action

and for me to not do any further investigation, that
Br. Brochu would be handling that.
Q: Did you drop the matter at that point?

E.R. 142

Q: Other than that you've never seen water in the creek?
A: That's correct.
Q: How long and for what period of time does the water run in Teton Creek on average; do you know?
A: Are you talking about within the study area specifically?
Q: Well, Teton Creek, and a little above.
A: Okay. Well, it's my impression that water flows year-round upstream from the Grand Teton Canal diversion. Downstream from that point there are periods during the irrigation season when there is no flow in Teton Creek downstream from that particular diversion. When we get further downstream there's what's called recharge as ground water comes back into the channel far down in the basin where the channel will flow water as groundwater reenters the channel.
Q: And that's significantly below the study area; is that not correct?
A: It is below the study area, yes.
Q: So for the vast majority of time the creek in the study area is dry; is it not?

25 A: Currently it is, yes.

E.R. 153

balls on them, and that bridge would be a real problem to try and pass logs through. So one of the problems was to get water and other things through that bridge. But you certainly are not going to pass gravel through it in any great amount of quantity.

Now, granted there is some go through.

Now, there are areas downstream that have problems. There is no question about that. But those problems are - - in large part are this natural eluvial fan deposit working because as you start down through the area - - and the area right where I'm drawing a mark which is kind of a curve, the grading at that point is 95.8 feet per mile; in other words, in one mile the stream drops 95.8 feet in this little region there.

At the area below the bridge, it gets down below 40. By the time it gets to the Teton River it's six feet per mile. So 95 here, 6 down at the river. And the river down near the confluence

between the Teton River and the Teton Creek is totally different. Now, there's no way of showing you the picture. But downstream below an area just off this map the stream is a nice meander. There's no gravel showing. It goes into the Teton River cleanly without any piles of gravel or anything

E.R. 154

there.

So what happens is that somewhere between Mr. Moses's property, which is right here, and downstream of the highway, which is just off this map, the gravels from anywhere have to stop. So the sand, the gravels, the materials that you saw in most of those photographs are course, heavy graded materials. They're not clay. You can see the rocks. They're big. And so that material has to drop somewhere in this vicinity below this point where it's 95 feet per mile down to an area down where it's about 20 feet per mile, which is below the highway that goes north, south into Driggs, and it's just off this map. You can see Driggs is here. It's just off the edge.

Q. What effect has the activity in his area had on those downstream people—his activity—the activity in his area?

A. Well, what happens is because Mr. Moses was taking gravel out, which is clearly understandable, that he has actually saved—by

taking gravel out in this area, he saved that gravel
from going downstream, in large part. Now the—
what I saw downstream is the primary problem is right
at this area where I'm showing. In fact, you saw it

E.R. 194

can you describe for us what you did in the creek?
A. Um, yeah. We would—like if there was a
gravel bar and different things, and then there was
these tree jams in there that somebody had placed in
there, we would dig out next to the tree jam, deeper on
that end, on the downstream side. And then as you come
back up stream, it would be shallower, and we would
take out different gravel bars and different things and
put the material to the sides.
Q. Okay, If you could be a little more
descriptive for the benefit of the jury. When you say
"take out," where was it taken to?
A. Just to the sides of the banks, you know, up
on the sides of the bank.
Q. Did it stay within the defined area of the
creek?
A. Um, some of it got up on to the bank, you
know, on the flat part of the bank, you know. But,
yeah, the majority of it stayed, I would say, to the

sides of the bank, because there would be holes and different things, you know, on the sides of the bank that we would fill in, in some of it.

Q. Is it fair to say you were contouring, recontouring the creek bed?

A. Yes.

CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS v. UNITED STATES & CARABELL v. UNITED STATES

This memorandum provides guidance to EPA regions and U.S. Army Corps of Engineers ["Corps"] districts implementing the Supreme Court's decision in the consolidated cases Rapanos v. United States and Carabell v. United States[1] (herein referred to simply as "Rapanos") which address the jurisdiction over waters of the United States under the Clean Water Act.[2] The chart below summarizes the key points contained in this memorandum. This reference tool is not a substitute for the more complete discussion of issues and guidance furnished throughout the memorandum.

Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

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[1] 126 S. Ct. 2208 (2006)

[2] 33 U.S.C. § 1251 et seq.

The agencies will decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and function of the tributary itself and the function performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors.

Background

Congress enacted the Clean Water Act ("CWA" or "the Act") "to restore and maintain the chemical,

physical, and biological integrity of the Nation's waters."[3] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in compliance with other specified sections of the Act.[4] In most cases, this means compliance with a permit issued pursuant to CWA §402 or §404. The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source[,]"[5] and provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas."[6]

In Rapanos, the Supreme Court addressed where the Federal government can apply the Clean Water Act, specifically by determining whether a wetland or tributary is a "water of the United States." The justices issued five separate opinions in Rapanos (one plurality opinion, two concurring opinions, and two dissenting opinions), with no single opinion commanding a majority of the Court.

The Rapanos Decision

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional

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[3] 33 U.S. C. §1251(a)
[4] 33 U.S.C. § 1311(a), § 1362(12)(A).
[5] 33 U.S.C § 1362(12)(A).
[6] 33 U.S.C. § 1362(7). See also 33 C.F.R. § 328.3(a) and 40 C.F.R. § 230.3(s).

sense and their abutting wetlands.[7] However, the plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. [8]

Justice Kennedy did not join the plurality's opinion but instead authored an opinion concurring in the judgment vacating and remanding the cases to the Sixth Circuit Court of Appeals.[9] Justice Kennedy agreed with the plurality that the statutory term "waters of the United States" extends beyond water bodies that are traditionally considered navigable.[10] Justice Kennedy, however, found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose[,]" and he instead presented a different standard for evaluating CWA jurisdiction over wetlands and other water bodies.[11] Justice Kennedy concluded that wetlands are "waters of the United States" "if the wetlands, either alone or in

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[7] Id. at 2220.

[8] Id. at 2225-27.

[9] Id. at 2236-52. While Justice Kennedy concurred in the Court's decision to vacate and remand the cases to the Sixth Circuit, his basis for remand was limited to the question of "whether the specific wetlands at issue possess a significant nexus with navigable waters." 126 S. Ct. at 2252. In contrast, the plurality remanded the cases to determine both "whether the ditches and drains near each wetland are 'waters,'" and "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection...." Id. at 2235.

[10] Id. at 2241.

[11] Id. at 2246.

combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of the other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[12]

Four justices, in a dissenting opinion authored by Justice Stevens, concluded that EPA's and the Corps' interpretation of "waters of the United States" was reasonable interpretation of the Clean Water Act.[13]

When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices.[14] Thus, regulatory jurisdiction under the CWA exists over a water body if either the

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[12] Id. at 2248. Chief Justice Roberts wrote a separate concurring opinion explaining his agreement with the plurality. See 126 S. Ct. at 2235-36.

[13] Id. at 2252-65. Justice Breyer wrote a separate dissenting opinion explaining his agreement with Justice Stevens' dissent. See 126 S. Ct. at 2266.

[14] See Marks v. United States, 430 U.S. 188, 193-94 (1977); Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J. concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test...that lower courts should apply," under Marks, as the holding of the Court); cf. League of United Latin American Citizens vs. Perry, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275, 281-282 (2001) (same).

plurality's or Justice Kennedy's standard is satisfied.[15] Since Rapanos, the United States has filed pleadings in a number of cases interpreting the decision in this manner.

The agencies are issuing this memorandum in recognition of the fact that the EPA regions and Corps districts need guidance to ensure that jurisdictional determinations, permitting actions, and other relevant actions are consistent with the decision and supported by the administrative record. Therefore, the agencies have evaluated the Rapanos opinions to identify those waters that are subject to CWA jurisdiction under the reasoning of a majority of the justices. This approach is appropriate for a guidance document. The agencies intend to more broadly consider jurisdictional issues, including clarification and definition of key terminology, through rulemaking or other appropriate policy process.

Agency Guidelines[16]

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[15] 126 S. Ct. at 2265 (Stevens, J., dissenting) ("Given that all four justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.") (emphasis in original).

[16] The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will

To ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the Rapanos decision, the agencies in this guidance address which waters are subject to CWA § 404 jurisdiction.[17] Specifically, this guidance identifies those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the Rapanos opinions.[18]

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be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and the EPA and/or Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statues, regulations, and case law.

[17] This guidance focuses only on those provisions of the agencies' regulations at issue in Rapanos—33 C.F.R. §§ 328.3(a)(1), (a)(5), and (a)(7); 40 C.F.R. §§ 230.3(s)(1), (s)(5), and (s)(7). This guidance does not address or affect other subparts of the agencies' regulations, or response authorities, relevant to the scope of jurisdiction under the CWA. In addition, because this guidance is issued by both the Corps and EPA, which jointly administer CWA § 404, it does not discuss other provisions of the CWA, including §§ 311 and 402, that differ in certain respects from § 404 but share the definition of "waters of the United States." Indeed, the plurality opinion in Rapanos noted that "...there is no reason to suppose that our construction today significantly affects the enforcement of § 1342...The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" (emphasis in original) 126 S. Ct. 2208, 2227. EPA is considering whether to provide additional guidance on these and other provisions of the CWA that may be affected by the Rapanos decicion.

[18] In 2001, the Supreme Court held that use of "isolated" non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. See Solid Waste Agency of

EPA and the Corps will continually assess and review the application of this guidance to ensure nationwide consistency, reliability, and predictability in our administration of the statute.

1. Traditional Navigable Waters (i.e., "(a) (1) Waters") and Their Adjacent Wetlands

Key Points

- The agencies will assert jurisdiction over traditional navigable waters, which includes all the waters described in 33 C.F.R. § 328.3 (a)(1), and 40 C.F.R. § 230.3 (s)(1).
- The agencies will assert jurisdiction over wetlands adjacent to traditional navigable waters, including over adjacent wetlands that do not have a continuous surface connection to traditional navigable waters.

EPA and the Corps will continue to assert jurisdiction over "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."[19] These waters are referred to in this guidance as traditional navigable waters.

Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). This guidance does not address SWANCC, nor does it affect the Joint Memorandum regarding that decision issued by the General Counsels of EPA and the Department of the Army on January 10, 2003. See 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

[19] 33 C.F.R. § 328.3 (a)(1); 40 C.F.R. § 230.3 (s)(1). The "(a)(1)" waters include all the "navigable waters of the United States," defined in 33 C.F.R. Part 329 and by numerous decisions of the

The agencies will also continue to assert jurisdiction over wetlands "adjacent" to traditional navigable waters as defined in the agencies' regulations. Under EPA and Corps regulations and as used in this guidance, "adjacent" means "bordering, contiguous, or neighboring." Finding a continuous surface connection is not required to establish adjacency under this definition. The Rapanos decision does not affect the scope of jurisdiction over wetlands that are adjacent to traditional navigable waters because at least five justices agreed that such wetlands are "waters of the United States."[20]

2. Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries

Key Points

- The agencies will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months).

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federal courts, plus all other waters that are navigable-in-fact (e.g., the Great Salt Lake, UT and Lake Minnetonka, MN).

[20] Id. at 2248 (Justice Kennedy, concurring) ("As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard of jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.")

- The agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection to such tributaries (e.g., they are not separated by uplands, a berm, dike, or similar feature.)

A non-navigable tributary[21] of a traditional navigable water is a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly by means of other tributaries. Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are "relatively permanent"—waters that typically (e.g., except due to drought) flow year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).[22] Justice

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[21] A tributary includes natural, man-altered, or man-made water bodies that carry flow directly or indirectly into a traditional navigable water. Furthermore, a tributary, for the purpose of this guidance, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). The flow characteristics of a particular tributary will be evaluated at the farthest downstream limit of such tributary (i.e., the point the tributary enters a higher order stream). It is reasonable for the agencies to treat the stream reach as a whole in light of the Supreme Court's observation that the phrase "navigable waters" generally refers to "rivers, streams, and other hydrographic features." 126 S. Ct. at 2222 (Justice Scalia, quoting Riverside Bayview, 474 U.S. at 131). The entire reach of a stream is a reasonably identifiable hydrographic feature. The agencies will also use this characterization of tributary when applying the significant nexus standard under Section 3 of this guidance.

[22] See 126 S. Ct. at 2221 n. 5 (Justice Scalia, plurality opinion) (explaining that "relatively permanent" does not necessarily

Scalia emphasizes that relatively permanent waters do not include tributaries "whose flow is 'coming and going at intervals...broken, fitful.'"[23] Therefore, "relatively permanent" waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard described below. The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without legal obligation to make a significant nexus finding.

In addition, the agencies will assert jurisdiction over those adjacent wetlands that have a continuous surface connection with a relatively permanent, non-navigable tributary, without the legal obligation to make a significant nexus finding. As explained above, the plurality opinion and the dissent agree that such wetlands are jurisdictional.[24] The plurality opinion indicates that "continuous surface connection" is a "physical connection requirement."[25] Therefore, a continuous surface

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exclude waters "that might dry up in extraordinary circumstances such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months").

[23] Id. (internal citations omitted).

[24] Id. at 2226-27 (Justice Scalia, plurality opinion).

[25] Id. at 2232 n.13 (referring to "our physical-connection requirement" and later stating that Riverside Bayview does not reject "the physical-connection requirement") and 2234 ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as

connection exists between a wetland and a relatively permanent tributary where the wetland directly abuts the tributary (e.g., they are not separated by uplands, a berm, dike or similar feature).[26]

3. Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent

Key Points

- The agencies will assert jurisdiction over non-navigable, not relatively permanent tributaries and their adjacent wetlands where such tributaries and wetlands have a significant nexus to a traditional navigable water.
- A significant nexus analysis will assess the flow characteristics and functions of the

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a practical matter *indistinguishable* from waters of the United States.") (emphasis in original). See also 126 S. Ct. at 2230 ("adjacent" means "physically abutting") and 2229 (citing to Riverside Bayview as "confirm[ing] that the scope of ambiguity of 'the waters of the United States' is determined by a wetland's *physical connection* to covered waters...") (emphasis in original). A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary. 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2 (defining wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions").

[26] While all wetlands that meet the agencies' definitions are considered adjacent wetlands, only those adjacent wetlands that have a continuous surface connection because they directly abut the tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard.

tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if the significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters.

- "Similarly situated" wetlands include all wetlands adjacent to the same tributary.
- Significant nexus includes consideration of hydrologic factors including the following:
    - volume, duration, and frequency of flow, including consideration of certain physical characteristics of the tributary.
    - proximity to the traditional navigable water
    - size of the watershed
    - average annual rainfall
    - average annual winter snow pack
- Significant nexus also includes consideration of ecologic factors including the following:
    - potential of tributaries to carry pollutants and flood waters to traditional navigable waters
    - provision of aquatic habitat that supports a traditional navigable water
    - potential of wetlands to trap and filter pollutants or store flood waters
    - maintenance of water quality in traditional navigable waters.
- The following geographic features generally are not jurisdictional waters:

- swales or erosional features (e.g. gullies, small washes characterized by low volume, infrequent, or short duration flow)
- ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

The agencies will assert jurisdiction over the following types of waters when they have a significant nexus with a traditional navigable water: (1) non-navigable tributaries that are not relatively permanent,[27] (2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and (3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).[28] As described below, the agencies will assess the flow characteristics and functions of the tributary itself, together with the functions performed by any wetlands adjacent to that tributary, to determine whether collectively they have a significant nexus with traditional navigable waters.

The agencies' assertion of jurisdiction over non-navigable tributaries and adjacent wetlands that

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[27] For simplicity, the term "tributary" when used alone in this section refers to non-navigable tributaries that are not relatively permanent.

[28] As described in Section 2 of this guidance, the agencies will assert jurisdiction, without the need for a significant nexus finding, over all wetlands that are both adjacent and have a continuous surface connection to relatively permanent tributaries. See pp. 6-7, supra.

have a significant nexus to traditional navigable waters is supported by five justices. Justice Kennedy applied the significant nexus standard to the wetlands at issue in Rapanos and Carabell: "[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[29] While Justice Kennedy's opinion discusses the significant nexus standard primarily in the context of wetlands adjacent to non-navigable tributaries[30], his opinion also addresses Clean Water Act jurisdiction over tributaries themselves. Justice Kennedy states that, based on the Supreme Court's decisions in Riverside Bayview and SWANCC, "the connection between a non-navigable water or wetland may be so close, or potentially so close, that Corps may deem the water or wetland a 'navigable

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[29] Id. at 2248. When applying the significant nexus standard to tributaries and wetlands, it is important to apply it within the limits of jurisdiction articulated in SWANCC. Justice Kennedy cites SWANCC with approval and asserts that the significant nexus standard, rather than being articulated for the first time in Rapanos, was established in SWANCC. 126 S. Ct. at 2246 (describing SWANCC as "interpreting the Act to require a significant nexus with navigable waters"). It is clear, therefore, that Justice Kennedy did not intend for the significant nexus standard to be applied in a manner that would result in assertion of jurisdiction over waters that he and the other justices determined were not jurisdictional in SWANCC. Nothing in this guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by SWANCC.

[30] 126 S. Ct. at 2247-50.

water' under the Act....Absent a significant nexus, jurisdiction under the Act is lacking."[31] Thus, Justice Kennedy would limit jurisdiction to those waters that have a significant nexus with traditional navigable waters, although his opinion focuses on the specific factors and functions the agencies should consider in evaluating significant nexus for adjacent wetlands, rather than for tributaries.

In considering how to apply the significant nexus standard, the agencies have focused on the integral relationship between the ecological characteristics of tributaries and those of their adjacent wetlands, which determines in part their contribution to restoring and maintaining the chemical, physical and biological integrity of the Nation's traditional navigable waters. The ecological relationship between tributaries and their adjacent wetlands is well documented in the scientific literature and reflects their physical proximity as well as shared hydrological and biological characteristics. The flow parameters and ecological functions that Justice Kennedy describes as most relevant to an evaluation of significant nexus result from the ecological inter-relationship between tributaries and their adjacent wetlands. For example, the duration, frequency, and volume of flow in a tributary, and subsequently the flow in downstream navigable waters, is directly affected by the presence of adjacent wetlands that hold floodwaters, intercept sheet flow from uplands, and then release waters to tributaries in a more even and constant manner. Wetlands may also help to

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[31] Id. At 2241 (emphasis added).

maintain more consistent water temperature in tributaries, which is important for some aquatic species. Adjacent wetlands trap and hold pollutants that may otherwise reach tributaries (and downstream navigable waters) including sediments, chemicals, and other pollutants. Tributaries and their adjacent wetlands provide habitat (e.g., feeding, nesting, spawning, or rearing young) for many aquatic species that also live in traditional navigable waters.

When performing a significant nexus analysis,[32] the first step is to determine if the tributary has any adjacent wetlands. Where a tributary has no adjacent wetlands, the agencies will consider the flow characteristics and functions of only the tributary itself in determining whether such tributary has a significant effect on the chemical, physical and biological integrity of downstream traditional navigable waters. A tributary, as characterized in Section 2 above, is the entire reach of the stream that is of the same order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream). For purposes of demonstrating a connection to traditional

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[32] In discussing the significant nexus standard, Justice Kennedy stated: "The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'..."126 S. Ct. at 2248. Consistent with Justice Kennedy's instruction, EPA and the Corps will apply the significant nexus standard in a manner that restores and maintains any of these three attributes of traditional navigable waters.

navigable waters, it is appropriate and reasonable to assess the flow characteristics of the tributary at the point at which water is in fact being contributed to a higher order tributary or to a traditional navigable water. If the tributary has adjacent wetlands, the significant nexus evaluation needs to recognize the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.

Therefore, the agencies will consider the flow and functions of the tributary together with the functions performed by all the wetlands adjacent to that tributary in evaluating whether a significant nexus is present. Similarly, where evaluating significant nexus for an adjacent wetland, the agencies will consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary. This approach reflects the agencies' interpretation of Justice Kennedy's term "similarly situated" to include all wetlands adjacent to the same tributary. Where it is determined that a tributary and its adjacent wetlands collectively have a significant nexus with traditional navigable waters, the tributary and all of its adjacent wetlands are jurisdictional. Application of the significant nexus standard in this way is reasonable because of its strong scientific foundation—that is, the integral ecological relationship between a tributary and its adjacent wetlands. Interpreting the phrase "similarly situated" to include all wetlands adjacent to the same

tributary is reasonable because such wetlands are physically located in a like manner (i.e., lying adjacent to the same tributary).

Principal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water. In addition to any available hydrologic information (e.g., gauge data, flood predictions, historic records of water flow, statistical data, personal observations/records, etc.), the agencies may reasonably consider certain physical characteristics of the tributary to characterize its flow, and thus help to inform the determination of whether or not a significant nexus is present between the tributary and downstream traditional navigable waters. Physical indicators of flow may include the presence and characteristics of a reliable ordinary high water mark (OHWM) with a channel defined by bed and banks.[33] Other physical indicators of flow may include shelving, wracking, water staining, sediment sorting, and sour.[34] Consideration will also

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[33] See 33 C.F.R. § 328.3(e). The OHWM also serves to define the lateral limit of jurisdiction in a non-navigable tributary where there are no adjacent wetlands. See 33 C.F.R. § 328.4(c). While EPA regions and Corps districts must exercise judgment to identify the OHWM on a case-by-case basis, the Corps' regulations identify the factors to be applied. These regulations have recently been further explained in Regulatory Guidance Letter (RGL) 05-05 (Dec. 7, 2005). The agencies will apply the regulations and the RGL and take other steps as needed to ensure that the OHWM identification factors are applied consistently nationwide.

[34] See, Justice Kennedy's discussion of "physical characteristics," 126 S. Ct. at 2248-2249.

be given to certain relevant contextual factors that directly influence the hydrology of tributaries including the size of the tributary's watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.

In addition, the agencies will consider other relevant factors, including the functions performed by the tributary together with the functions performed by any adjacent wetlands. One such factor is the extent to which the tributary and adjacent wetlands have the capacity to carry pollutants (e.g., petroleum wastes, toxic wastes, sediment) or flood waters to traditional navigable waters, or to reduce the amount of pollutants or flood waters that would otherwise enter traditional navigable waters.[35] The agencies will also evaluate ecological functions performed by the tributary and any adjacent wetlands which affect downstream traditional navigable waters, such as the capacity to transfer nutrients and organic carbon vital to support downstream foodwebs (e.g., macroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream), habitat services such as providing spawning areas for recreationally or commercially important species in downstream waters, and the extent to which the tributary and adjacent wetlands perform functions

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[35] See, generally, 126 S. Ct. at 2248-53; see also 126 S. Ct. at 2249("Just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries....") (citing to Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 524-25(1941)).

related to maintenance of downstream water quality such as sediment trapping.

After assessing the flow characteristics and functions of the tributary and its adjacent wetlands, the agencies will evaluate whether the tributary and its adjacent wetlands are likely to have an effect that is more than speculative or insubstantial on the chemical, physical, and biological integrity of a traditional navigable water. As the distance from the tributary to the navigable water increases, it will become increasingly important to document whether the tributary and its adjacent wetlands have a significant nexus rather than a speculative or insubstantial nexus with a traditional navigable water.

Accordingly, Corps districts and EPA regions shall document in the administrative record the available information regarding whether a tributary and it adjacent wetlands have a significant nexus with a traditional navigable water, including the physical indicators of flow in a particular case and available information regarding the functions of the tributary and any adjacent wetlands. The agencies will explain their basis for concluding whether or not the tributary and its adjacent wetlands, when considered together, have a more than speculative or insubstantial effect on the chemical, physical, and biological integrity of a traditional navigable water.

Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not

tributaries or they do not have a significant nexus to downstream traditional navigable waters. In addition, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.[36] Even when not jurisdictional waters subject to CWA § 404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water. In addition, these geographic features may function as point sources (i.e., "discernible, confined, and discrete conveyances"), such that discharges of pollutants to other waters through these features could be subject to other CWA regulations (e.g., CWA §§ 311 and 402).[37]

Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters. For example, in some cases these ephemeral tributaries may serve as a transitional area between the upland environment and the traditional navigable waters. During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the traditional navigable

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[36] See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
[37] 33 U.S.C. § 1362 (14).

waters. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream traditional navigable waters. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream traditional navigable waters.

Documentation

As described above, the agencies will assert CWA jurisdiction over the following waters without the legal obligation to make a significant nexus determination: traditional navigable waters and wetlands adjacent thereto, non-navigable tributaries that are relatively permanent waters, and wetlands with a continuous surface connection with such tributaries. The agencies will also decide CWA jurisdiction over other non-navigable tributaries and over other wetlands adjacent to non-navigable tributaries based on a fact-specific analysis to determine whether they have a significant nexus with traditional navigable waters. For purposes of CWA § 404 determinations by the Corps, the Corps and EPA are developing a revised form to be used by field regulators for documenting the assertion or declination of CWA jurisdiction.

Corps districts and EPA regions will ensure that the information in the record adequately supports any jurisdictional determination. The record shall, to the maximum extent practicable, explain the rationale for the determination, disclose

the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination. The Corps districts and EPA regions will also demonstrate and document in the record that a particular water either fits within a class identified above as not requiring a significant nexus determination, or that the water has a significant nexus with a traditional navigable water. As a matter of policy, Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

All pertinent documentation and analyses for a given jurisdictional determination (including the revised form) shall be adequately reflected in the record and clearly demonstrate the bases for asserting or declining CWA jurisdiction.[38] Maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed are examples of information that will assist staff in completing accurate jurisdictional determinations. The level of documentation may vary among projects. For example, jurisdictional

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[38] For jurisdictional determinations and permitting decisions, such information shall be posted on the appropriate Corps website for public and interagency information.

determinations for complex projects may require additional documentation by the project manager.

s/ Benjamin H. Grumbles
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No. 07-1195

In the Supreme Court of the United States

C. LYNN MOSES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the creek segment at issue in this case is part of "the waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 886, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA); 33 U.S.C. 1362(7).

2. Whether petitioner's activities, which involved the use of heavy equipment to move and redeposit thousands of cubic yards of dredged materials within the creek bed and to deposit log structures into the creek bed, constituted a "discharge of a pollutant" within the meaning of the CWA, 33 U.S.C. 1362(12)(A).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 496 F.3d 984.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2007. A petition for rehearing was denied on September 14, 2007 (Pet. App. 20a). On November 30, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 11, 2008, and the petition was filed on January 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was found guilty of three counts of knowingly discharging, or causing to be dis-

charged, dredged or fill material into "waters of the United States" without a permit, in violation of 33 U.S.C. 1319(c)(2)(A). He was sentenced to 18 months of imprisonment on each count, to be served concurrently; a $9000 fine ($3000 on each count); a $300 special assessment ($100 on each count); and one year of supervised release on each count, to be served concurrently. Pet. App. 21a-36a. The court of appeals affirmed. *Id.* at 1a-19a.

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA), "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). A knowing violation of Section 301(a) is a criminal offense. See 33 U.S.C. 1319(c)(2)(A).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States."

See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1]

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *ibid.* The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Justice Kennedy interpreted the term "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in

the judgment); see *id.* at 779-780.[2] In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Id.* at 780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting).

3. Petitioner is a real estate broker and developer in Teton County, Idaho. Pet. App. 2a. For more than 20 years, he has worked to develop a residential subdivision on an approximately 50-acre parcel of land that lies in the flood plain of Teton Creek. *Ibid.* The court of appeals' opinion describes Teton Creek as follows:

> Because of an irrigation diversion structure installed in Alta, Wyoming, upstream of the subdivision, water actually flows in the portion of Teton Creek adjacent to the subdivision only during the spring run-off, which lasts about two months per year. * * * When it does flow, the volume and power of the flow are high, even torrential. Teton Creek is a tributary of the Teton River, which flows into the Snake River. Water continues to flow year-round in Teton Creek above the diversion, and also from a point below the subdivision until it reaches the Teton River. There

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[2] Justice Kennedy explained that wetlands "possess the requisite nexus" to traditional navigable waters "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

> is no claim that the Snake River, the Teton River, and Teton Creek, apart from the segment that flows only during the spring runoff, fail to qualify as waters of the United States.

Ibid.; see *id.* at 9a.

Beginning in the 1980s, and continuing until the government brought this prosecution in 2005, petitioner directed heavy-equipment operators to reroute and reshape an approximately half-mile-long segment of Teton Creek in an effort to control the flow of the creek during spring runoff. Pet. App. 2a-4a. During the periods covered by each of the three counts in the indictment (fall 2002, spring 2003, and spring 2004), petitioner hired heavy-equipment operators to re-contour Teton Creek by using bulldozers to, inter alia, dredge and redeposit the material within the creek bed. *Id.* at 3a-5a. He also directed operators to place fill material such as log structures in the creek using other heavy equipment. *Ibid.* Through those activities, petitioner attempted to convert the original three channels of Teton Creek into one broader and deeper channel. *Id.* at 2a-3a. Those activities have "greatly disturbed" and destabilized Teton Creek. *Id.* at 4a-5a; see *id.* at 15a-16a. Petitioner undertook those activities despite repeated warnings from the Corps and EPA that his activities required a CWA permit and were unlawful if conducted without one. *Id.* at 3a-4a.

Petitioner was charged with three counts of knowingly discharging, and causing to be discharged, pollutants into Teton Creek without a permit, in violation of the CWA. See 33 U.S.C. 1311(a), 1319(c)(2)(A); 18 U.S.C. 2; Pet. App. 5a. A jury found petitioner guilty on all three counts. *Ibid.* Petitioner was sentenced on June 19, 2006, the day this Court issued its decision in *Ra-*

panos. At the sentencing hearing, the parties and the district court discussed the plurality and concurring opinions in *Rapanos*. See Gov't C.A. Supp. App. 369-376. The court concluded that, "at least under Justice Kennedy's view, * * * this is a matter that is within the jurisdiction of the United States and would constitute waters of the United States." *Id.* at 376.

4. The court of appeals affirmed. Pet. App. 1a-19a.

a. The court of appeals held that the evidence was sufficient to support the jury's determination that the portion of Teton Creek into which petitioner discharged pollutants is part of "the waters of the United States." Pet. App. 7a-15a. The court first observed that Teton Creek is an interstate tributary of traditional navigable waters, and that the creek had flowed year-round until the construction of the irrigation diversion in Alta, Wyoming. *Id.* at 2a, 9a. The court of appeals noted this Court's statement, with respect to traditional navigable waters, that "[w]hen once found to be navigable, a waterway remains so." *Id.* at 10a (quoting *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940)). Concluding that a similar rule should apply to tributaries, the court stated that it "d[id] not see how a mere man-made diversion, however long ago undertaken, could change Teton Creek from a water of the United States into something else." *Ibid.*

The court of appeals further held that, even if the historical events described above were disregarded, and the statutory inquiry were limited to the "present conditions" of Teton Creek, the portion of the creek into which petitioner discharged pollutants was covered by the CWA under the standards announced in all of the opinions in *Rapanos*. Pet. App. 10a; see *id.* at 10a-14a. The court of appeals observed that all Members of the

Rapanos Court had "agreed that intermittent streams (at least those that are seasonal) can be waters of the United States." *Id.* at 14a. The court then explained:

> The man-made severance of Teton Creek at Alta, Wyoming, may have made the portion in question here dry during much of the year, but when the time of runoff comes, the Creek rises again and becomes a rampaging torrent that ultimately joins its severed lower limb and then rushes to the Teton River, the Snake River, and onward to the Columbia River and the Pacific Ocean. Indeed, it is that very rush of water that induced [petitioner] to take action.

Ibid. Based on the record evidence, the court concluded that the relevant segment of Teton Creek "constitutes a water of the United States" that is covered by the CWA. *Ibid.*

b. The court of appeals also held that the evidence was sufficient to show that petitioner's activities constituted pollutant discharges proscribed by the CWA, except as specifically authorized by a permit. Pet. App. 15a-17a. The court rejected petitioner's contention that the discharges were lawful because petitioner "did not run his heavy equipment and engage in his assault on Teton Creek while the water was actually rushing between its banks." *Id.* at 15a. The court explained that acceptance of petitioner's argument "would countenance significant pollution of the waters of the United States as long as the polluter dumped the materials at a place where no water was actually touching them at the time." *Ibid.* The court further observed that the purpose of petitioner's discharges was to "create a situation where pollutants—disturbed and moved materials as well as

log structures—remained in Teton Creek when the water rose within it." *Id.* at 15a-16a.

The court of appeals also rejected petitioner's contention that his activities involved "incidental fallback" rather than "discharges" regulated by the CWA. Pet. App. 16a-17a. The court explained that "[i]ncidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity," and that "[e]xamples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket." *Id.* at 16a. The court concluded that petitioner's activities, which involved "massive movement and redistribution of materials within Teton Creek," were not "similar to a small volume of dirt that happened to fall off a bucket and back to the approximate place of removal." *Id.* at 17a.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the tributary at issue in this case is not part of "the waters of the United States" within the meaning of the CWA. That argument lacks merit.

a. Teton Creek is a major tributary carrying large volumes of water, and it has a significant nexus to the traditional navigable waters into which it flows. In the one segment of Teton Creek that does not flow year-round, the water volume during runoff is so substantial and powerful that it (1) causes flooding, which petitioner sought to prevent; (2) causes annual displacement of large volumes of gravel, which petitioner repeatedly dredged and redeposited with bulldozers; and (3) transports downstream very sizable debris, including trees approximately 30-50 tall. See Pet. App. 14a, 16a; Gov't C.A. App. 237-240, 254, 312-315, 321-324, 350-353; Gov't

Exh. 9-1 (video of Teton Creek showing the water flow in June 2005). The evidence also showed that the stretch of Teton Creek near petitioner's subdivision flows every year during spring runoff. Pet. App. 2a; Gov't C.A. App. 237. Although the duration of such flow varies from year to year depending on the weather and snowpack, water typically flows in this segment from approximately mid-May into July. *Id.* at 254. At peak runoff, Teton Creek "can be a raging torrent" (*ibid.*), flowing "hard enough, it would take a pickup truck down it" (*id.* at 192-193, 202), with flow rates of 900-2000 cubic feet per second (*id.* at 315, 353).

Thus, the evidence introduced at trial showed that Teton Creek contributes substantial volumes of water to the traditionally navigable Teton, Snake and Columbia Rivers, into which it flows; that the creek flows perennially both upstream and downstream of the artificially-seasonal stretch near petitioner's subdivision; and that the creek is capable of carrying pollutants and flood waters to traditional navigable waters. That evidence supports the conclusion that Teton Creek as a whole, including the segment into which petitioner discharged pollutants, has a significant nexus to traditional navigable waters. That finding would in turn support a determination that the creek was part of "the waters of the United States" as that term was construed in the opinions in *Rapanos*.[3]

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[3] Petitioner did not object at trial to the jury instruction pertaining to the meaning of "the waters of the United States" or the meaning of "discharge of a pollutant." See Gov't C.A. App. 363 (petitioner objected only to one unrelated instruction, on the ground that it was cumulative). Hence, as the government argued in the Ninth Circuit, any claim that the instruction was erroneous in light of *Rapanos* should be reviewed for plain error under Rule 52(b) of the Federal Rules of Criminal Pro-

b. Petitioner's contention (Pet. i, 7-8) that the court of appeals' decision is inconsistent with *Rapanos* is premised in part on a misreading of Justice Kennedy's concurrence in that case. Petitioner argues (see Pet. 7-8) that the court of appeals should have ascertained whether *his own pollutant discharges* had a significant nexus to, *i.e.*, effect on, the downstream traditional navigable waters into which Teton Creek flows. Under that approach, the determination whether a particular waterbody is part of "the waters of the United States" would depend in part on the nature and likely effects of the discharges themselves.

Justice Kennedy's concurring opinion in *Rapanos* does not support that atextual approach. Rather, Justice Kennedy stated that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). Although evidence of the downstream effects of a particular discharge may demonstrate a significant nexus between a tributary and the traditional navigable waters into which it flows, a discharge-specific showing is unnecessary under Justice Kennedy's standard. That point is confirmed by the nature of the issues that Justice Kennedy would have had the lower courts address

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cedure. See *Johnson* v. *United States*, 520 U.S. 461, 467 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). By contrast, the sufficiency-of-the-evidence standard applies to the adequacy of the evidence *under the instructions as given by the district court*. *Cf. Lockhart* v. *Nelson*, 488 U.S. 33, 42 (1988); *Neder* v. *United States*, 527 U.S. 1, 10 (1999). The court of appeals treated petitioner's challenge as contesting the sufficiency of the evidence, Pet. App. 7a, and petitioner makes no separate challenge to the jury instructions in this Court.

on remand. The remands would have considered the general connections between the wetlands and waters at issue, not the particular effects that the defendants' conduct would have had. See *id.* at 783-787.

But even if a showing as to the effects of particular discharges *were* required, the government would have carried its burden in this case. Although the court of appeals did not adopt petitioner's understanding of Justice Kennedy's concurrence, the court found that "[t]he evidence supported a determination that when the water flowed, materials dislodged by [petitioner's] operations would be carried downstream into the lower portion of Teton Creek and on into the Teton River." Pet. App. 16a; see *id.* at 4a-5a; 15a-16a. Petitioner is therefore wrong in contending (Pet. 10) that "it is undisputed that there is no nexus between [petitioner's] activities and the physical, chemical and biological integrity of any navigable waters of the United States."

For essentially the same reasons, petitioner is also wrong in arguing (Pet. 9-10) that the Ninth Circuit's decision in this case conflicts with the Eleventh Circuit's ruling in *United States* v. *Robison*, 505 F.3d 1208 (2007). Contrary to petitioner's contention, the Eleventh Circuit did not interpret Justice Kennedy's *Rapanos* concurrence to require "a significant nexus between *the defendants' activities* and the * * * integrity of a navigable water of the United States." Pet. 10 (emphasis added). Rather, the Eleventh Circuit correctly understood Justice Kennedy's standard to require a nexus between traditional navigable waters and the "water or wetland"

into which pollutants are discharged. 505 F.3d at 1218; see *id.* at 1222-1223.[4]

c. Petitioner also suggests (Pet. 6-7) that the plurality opinion in *Rapanos* established the controlling legal standard for determining whether the CWA encompasses a particular tributary. While there is disagreement among the circuits concerning the proper application of *Rapanos* (see note 4, *supra*), no court of appeals has held that the *Rapanos* plurality opinion provides the sole governing standard. Petitioner's contention lacks merit and provides no basis for this Court's review in this particular case.

Under a proper understanding of *Rapanos*, the Corps and EPA may exercise regulatory jurisdiction over any tributary that satisfies *either* the standard for

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[4] The Solicitor General has not yet decided whether to seek this Court's review of the Eleventh Circuit's holding in *Robison*, see 505 F.3d at 1219-1222, that CWA coverage may be established *only* under the standard set forth in Justice Kennedy's *Rapanos* concurrence, and not under the standard adopted by the *Rapanos* plurality. The *Robison* court's resolution of that issue squarely conflicts with the decision of the First Circuit in *United States* v. *Johnson*, 467 F.3d 56, 66 (2006), cert. denied, 128 S. Ct. 375 (2007), which held that the "federal government can establish jurisdiction over [wetlands] if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." The Eleventh Circuit denied rehearing in *Robison* on March 27, 2008, and a petition for a writ of certiorari would currently be due on June 25, 2008. Even if the government ultimately files a certiorari petition in *Robison* and this Court grants review, the Court's decision is unlikely to affect the proper disposition of the instant case, since the court of appeals found that the stretch of Teton Creek into which petitioner discharged pollutants was covered by the CWA under both the *Rapanos* plurality's standard and that of Justice Kennedy. See Pet. App. 14a-15a. The petition in this case therefore should not be held pending the possible filing and disposition of any certiorari petition in *Robison*.

CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 547 U.S. at 810 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the agencies' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members. See *United States* v. *Jacobsen*, 466 U.S. 109, 115-118 (1984) (holding that the controlling legal standard in a prior case was established by a principle adopted by two Justices who wrote separately in the majority and four Justices who joined the dissent); *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks* v. *United States*, 430 U.S. 188 (1977), as the holding of the Court); cf. *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668 n.15, 1671 (2007) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).

In any event, the evidence supports the jury's verdict in this case under the standard adopted by the *Rapanos* plurality. See Pet. App. 12a-13a, 14a. The plurality construed the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams,

oceans, rivers, and lakes," 547 U.S. at 739, that are connected to traditional navigable waters, see *id.* at 742. The *Rapanos* plurality made clear that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Teton Creek is a conventionally identifiable hydrographic feature with an established bed and bank. It flows year-round throughout much of its length, both upstream and downstream of the portion affected by the irrigation diversion, and has substantial seasonal flow in the segment into which petitioner discharged pollutants. It is thus quite different from a naturally episodic and rare flow of water or a "transitory puddle[]." *Id.* at 733.[5]

d. Finally, even if some question concerning the CWA's application to seasonal streams (or seasonal segments of larger streams) otherwise warranted this Court's review, this case would be an unsuitable vehicle for resolving it. As one independent ground for its decision, the Ninth Circuit explained that the whole of Teton Creek had flowed year-round until the installation of an irrigation diversion structure in Alta, Wyoming, and the court concluded that the man-made diversion did not affect the CWA's application to the stream segment at

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[5] Petitioner also asserts (Pet. 11-12) that this Court should grant review to decide whether the tributary at issue in this case is part of "the waters of the United States" under a non-binding guidance document issued by the Corps and EPA to assist agency personnel in implementing *Rapanos*. The significance of that guidance was not addressed by the court of appeals in this case or in any other case cited by petitioner. In any event, Teton Creek satisfies the *Rapanos* standards as interpreted in the guidance.

issue here. See Pet. App. 2a, 9a-10a. Petitioner makes no effort to challenge that holding, let alone to explain why it would warrant this Court's review.

2. There is likewise no merit to petitioner's contentions that, even if the relevant segment of Teton Creek is part of "the waters of the United States" within the meaning of 33 U.S.C. 1362(7), his conduct did not violate the CWA. Petitioner argues (Pet. i, 7) that his activities were not subject to the CWA's permitting requirements because those activities occurred while no water was in the stream bed. The *Rapanos* plurality squarely rejected the proposition that a "channel is a 'water' covered by the Act only during those times when water flow actually occurs," explaining that "no one contends that federal jurisdiction appears and evaporates along with the water." 547 U.S. at 733 n.6 (plurality opinion). Justice Kennedy's concurring opinion also affords no support to petitioner's argument. Justice Kennedy explained that "the Corps can reasonably interpret the Act to cover the paths of such impermanent streams," *id.* at 770 (Kennedy, J., concurring in the judgment), and he observed that the exclusion of waterways with irregular flows would "make[] little practical sense in a statute concerned with downstream water quality," *id.* at 769.

Petitioner's approach would except from the CWA's coverage discharges that are made into the stream beds of covered waters and that have a demonstrable likelihood of impairing the quality of traditional navigable waters downstream, simply because the flow of water had temporarily abated at the time the discharge occurred. As the court of appeals explained, "the mere fact that pollutants are deposited while this part of Teton Creek is dry cannot make a significant difference. * * * To hold otherwise would countenance significant

pollution of the waters of the United States as long as the polluter dumped the materials at a place where no water was actually touching them at the time." Pet. App. 15a. Petitioner identifies no decision of this Court or of any court of appeals that has adopted the limitation on CWA coverage that he advocates.

Petitioner further contends (Pet. 8-9) that this Court should address the question whether the incidental fallback of dredged material off of heavy equipment is a "discharge of a pollutant" within the meaning of the CWA, 33 U.S.C. 1362(12)(A). This case does not present that issue. The court of appeals did not hold that incidental fallback constitutes a pollutant discharge under the CWA, but rather held that petitioner's own discharges did not involve incidental fallback. Pet. App. 17a.

The Corps regulations define "incidental fallback" as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal." 33 C.F.R. 323.2(d)(2)(ii); see Pet. App. 16a.[6] The court of appeals

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[6] Petitioner's reliance (Pet. 9) on *National Association of Home Builders* v. *United States Army Corps of Engineers*, 440 F.3d 459 (D.C. Cir. 2006), is misplaced. The court of appeals in that case did not address the merits of the plaintiff's facial challenge to 33 C.F.R. 323.2(d)(2)(i), which addresses "the use of mechanized earth-moving equipment" in waters of the United States, but simply held that the challenge was ripe for judicial review. See 440 F.3d at 463-465. Although the district court on remand held that Section 323.2(d)(2)(i) is invalid, see *National Ass'n of Home Builders* v. *United States Army Corps of Eng'rs*, Civil Action No. 01-0274(JR), 2007 WL 259944, at *3-*4 (D.D.C. Jan. 30, 2007) (*NAHB*), any inconsistency between a district court ruling and the court of appeals' decision in this case would not warrant this Court's review. In any event, the district court in *NAHB*

explained that "the evidence here shows massive movement and redistribution of materials within Teton Creek." *Id.* at 17a. The court rejected petitioner's contention that his own activities involved conduct "similar to a small volume of dirt that happened to fall off a bucket and back to the approximate place of removal." *Ibid.* That factbound assessment of the record in this case is correct and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2008

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simply held that the challenged regulatory provision did not adequately define the line between incidental fallback and regulable discharges. See *id.* at *3. The court did not suggest that activities of the sort in which petitioner engaged, which involved "massive movement and redistribution of materials within Teton Creek," Pet. App. 17a, including the erection of "log and gravel structures in the creek," *id.* at 3a, would fall outside the CWA's coverage.

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(3)

App. No. 07-1195

FILED
JUN 2 - 2008
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

C. LYNN MOSES
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The Government continues to misstate the facts in this case in an attempt to establish Clean Water Act jurisdiction where none should exist. The Government would have this Court construe the Clean Water Act so broadly as to undermine the intent of the legislation in the first place; to protect the waters of the United States from chemical and other biological pollutants. Instead of enforcing the Clean Water Act against those who are actually polluting the waters of the United States, the Government seems intent on construing this legislation so broadly as to ultimately include every kayaker or fly fisher who wades into a stream and accidentally dislodges some rocks on the bank of a river. The Clean Water Act clearly has limits on its application and the Court now has an opportunity to reign in the enforcement of the Clean Water Act to meet the purposes for which it was passed.

By presenting such an inaccurate picture of the facts in this case, the Government is attempting to distract the Court from a case that presents this Court with an opportunity to not only provide the circuits with clear direction regarding the application of the Clean Water Act, but also to right a wrong that has been effectuated through the conviction of Mr. C. Lynn Moses.

I. AT THE TIME MOSES CREATED THE FLOOD CONTROL CHANNEL IN QUESTION THE CORPS HAD NOT ASSERTED JURISDICTION OVER THIS AREA.

The Government seems to have directed at Mr. Moses' feet responsibility for all that has happened in the subject area for the past 150 years. Since our Constitution forbids Bills of Attainder, that hardly seems fair.

In order to be fair, the impact and activities in this area need to be viewed as at least three major events. First is the irrigation diversion that completely dewaters this area and turned what had been a year round stream into a flood control channel used only for the disposition of flood waters that the diversion canals are insufficient to handle. This is not an intermittent stream that ebbs and flows with the natural happenstance of precipitation. Rather it is a flood control device employed only when the farmers who own the water do not use it for irrigation.

The second major event in this area was the development activities undertaken in the early 1980's when the city of Driggs was flooded by waters turned loose from the irrigation diversion and the citizens of the area demanded something be done. When Mr. Moses undertook to convert this flood control area from essentially a flood plain to a flood channel that could control the waters and divert them to the county's culvert and prevent flooding of the city, the Corps made it plain that to be in their

jurisdiction they would need to perform studies to determine the significance of the area to the Nations waterways.

The final events to be examined are the actions of Mr. Moses for which he was indicted. Contrary to the assertions by the Government, Mr. Moses was not indicted for dewatering this area through the irrigation diversion 100 years ago. Mr. Moses was not indicted for changing the area from a flood plain to a flood channel in the early 1980s when the Corp had not asserted jurisdiction. Mr. Moses was indicted for doing maintenance work on the channel that had been created in the early 1980s. The Government's expert testified that the work performed by Mr. Moses during the indictment years was necessitated by the work performed in the early 1980s. (*See* Pet. Reply App., *Infra*, pp. 3a-4a).

Mr. Moses simply cleared debris out of the flood channel.

II. THE PETITIONER'S PERIODIC MAINTENANCE OF A FLOOD CHANNEL DID NOT RESULT IN THE DISCHARGE OF A POLLUTANT INTO THE WATERS OF THE UNITED STATES.

None of the gravel disturbed during the maintenance operations performed by Mr. Moses ever migrated to any navigable water of the United States. The Court of Appeals erroneously stated that the gravel migrated into the Teton River, *see* Pet. App., p. 16a. There was no evidence to support this

conclusion by the Court of Appeals. *See* Pet. App., p. 51a-53a:

> Now, there are areas downstream that have problems. There is no question about that. But those problems are – in large part are this natural eluvial fan deposit working because as you start down through the area – and the area right where I'm drawing a mark which is kind of a curve, the grading at that point is 95.8 feet per mile; in other words, in one mile the stream drops 95.8 feet in this little region there.
>
> At the area below the bridge, it gets down below 40. By the time it gets to the Teton River it's six feet per mile. So 95 here, 6 down at the river. And the river down near the confluence between the Teton River and the Teton Creek is totally different. Now, there's no way of showing you the picture. But downstream below an area just off this map the stream is a nice meander. There's no gravel showing. It goes into the Teton River cleanly without any piles of gravel or anything there.
>
> So what happens is that somewhere between Mr. Moses's property, which is right here, and downstream of the highway, which is just off this map, the gravels from

> anywhere have to stop. So the sand, the gravels, the materials that you saw in most of those photographs are course, heavy graded materials. They're not clay. You can see the rocks. They're big. And so that material has to drop somewhere in this vicinity below this point where it's 95 feet per mile down to an area down where it's about 20 feet per mile, which is below the highway that goes north, south into Driggs, and it's just off this map. You can see Driggs is here. It's just off the edge.

None of the sand, gravel or other alleged discharge ever made it into the Teton River. Not only did none of the sand, gravel or other alleged discharge materials ever make it into the Teton River, the evidence at trial showed that Mr. Moses actually removed material from the flood channel. There is no evidence of him putting materials into the flood channel.

The evidence at trial was that Mr. Moses removed sand and gravel from the flood channel, not that he deposited anything new into the channel. *See* Pet. App., p. 53a-54a:

> Q: What effect has the activity in his area had on those downstream people – his activity – the activity in his area?
> A: Well, what happens is because Mr. Moses was taking gravel out, which is clearly understandable, that he has

> actually saved – by taking gravel out of this area, he saved that gravel from going downstream, in large part.

See Pet. Reply App., *Infra*, p. 1a:

> Q: And you don't disagree or dispute the fact that the work that you did did cause discharges in Teton Creek?
> A: We moved the existing gravels and sands in the creek to different locations there. We did not haul anything in and put in. All the things that we did in the creek were either trees that were already there or adjacent and moved the gravels around in the stream channel to make a passable flood channel.

Clearly, contrary to what the government is attempting to establish, Mr. Moses did not deposit any material into Teton Creek.

In order to assert jurisdiction, under Rapanos v. United States, 126 S.Ct. 2208 (U.S. 2006), the EPA must determine that a particular activity or feature has a significant nexus to the purpose of the Clean Water Act, which purpose is to preserve the physical, chemical, and biological integrity of the Nations navigable waters. 33 U.S.C § 1251, (Pet. App., p. 38a). This determination is, of course, required by the Kennedy concurrence in Rapanos.

Mr. Moses' simple maintenance of the channel had no impact on the physical integrity of a navigable water of the United States.

In addition, Mr. Moses' activities were all in uplands; no wetlands were located in the area. *See* Pet. App., p. 45a:

> THE COURT: No. I understand your position. Again, just so we're clear, Mr. Breitsameter, the Government is willing to stipulate that there was no discharge into any wetlands arising out of this case; correct?
> MR. BREITSAMETER: That's correct, Your Honor.

Likewise, there is no suggestion that Mr. Moses introduced any chemical or biological agent whatsoever into the area. Even the minimal trees that were used to repair existing log jams were trees washed down with the latest flood. Thus, there can be no argument that his actions affected the chemical or biological integrity of a navigable water of the United States.

The conflict between the Ninth Circuit decision in this case and other appellate court decisions as well as the wholesale failure of the Ninth Circuit to address the issues pursuant to the Agencies' own criteria, create the type of embarrassing situation that calls for a Writ of Certiorari and which has a substantial chance of resulting in a significant modification of the outcome in this case.

III. THE GOVERNMENT ACKNOWLEDGES THE SPLIT AMONG THE CIRCUITS IN APPLYING THE *RAPANOS* DECISION.

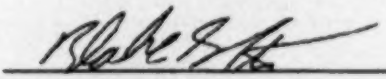
The Government, in footnote 4 of their Brief in Oppositon to this Petition for a Writ of Certiorari, acknowledges the split among several Circuit Courts on this matter of applying the Rapanos decision and the need for clarification of these issues by this Court. This case presents an opportunity to provide the clarification that is so clearly needed in this area of the law.

CONCLUSION

The Governments attempt to misrepresent the facts of this case should not be allowed to effect this Court's opportunity to address an issue that desperately needs clarification by this Court. For the above stated reasons, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 30th day of May, 2008.

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APPENDIX

E.R. 145

Teton Creek crosses from the Wyoming into the Idaho -- you're aware it's an interstate water body; isn't that also true?

A: Yeah, I realize it starts in Wyoming and it crosses Idaho line.

Q: And you don't disagree or dispute the fact that the work that you did did cause discharges in Teton Creek?

A: We moved the existing gravels and sands in the creek to different locations there. We did not haul anything in and put in. All the things that we did in the creek were either trees that were already there or adjacent and moved the gravels around in the stream channel to make a passable flood channel.

Q: You didn't fall trees to create barriers for logjams?

A: Pardon?

Q: You didn't fall any trees to create logjam barriers?

A: There were some dried trees that were

about to fall down that we used that were close by,
but 99 percent of them were trees that we inherited
that washed down the creek from upstream and we just
moved them where they would be beneficial rather than

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your view?
A: I believe so, yes, sir.
Q: Were there any beneficial of the work that you saw?
A: Yes, sir.
Q: What were the beneficial effects?
A: It prevented the homes from being flooded in the subdivision.
Q: How many homes are there?
A: The Aspens, I don't know the exact number, but there is at least eight or nine at the existing. There are new ones being built as we speak, sir.
Q: Would this kind of quality work preven them from being flooded, as well, in a runoff year?
A: If it is was repeated every year, sir, it would be necessary to prevent them from being flooded
Q: The work would have to -- its necessity to have it repeated?
A: Yes, sir.
Q: Because the gravel, as Mr. Hatch -- or Mr. Tupper, I can't remember which, testified that it comes down. Is that your understanding?

23 Yes, sir.
24 Q: So each year there is significant deposits of
25 gravel?